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Supreme Court of the United States

OCTOBER TERM, 1956

No. 717

EFCO MANUFACTURING, INC.,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner prays that a Writ of Certiorari issue to review the decree of the United States Court of Appeals for the First Circuit entered in the above-entitled case on December 13, 1955.

Opinion Below

The opinion of the Court of Appeals printed in Appendix A hereto *infra* p. 19, is reported in 227 F.2d 675.

Jurisdiction

The decree of the Court of Appeals was entered December 13, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. A. Section 1254 (1).

Questions Presented

1. Whether there was substantial evidence on the record considered as a whole supporting the amounts of back-pay awarded to two of the Petitioner's employees.

2. Whether the standard for evaluating conflicts of evidence was mis-apprehended or grossly mis-applied by the Court of Appeals in finding that there was substantial evidence supporting the amounts of back-pay awards to two of the petitioner's employees.

3. Whether the determination of an amount of back-pay due an employee under the Labor Management Relations Act must be supported by a preponderance of affirmative evidence.

Statutes

The statutes involved are: 29 U. S. C. Section 160 (c) and (e)

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice and to take such affirmative action including reinstatement of employees with or without back pay as will effectuate the policies of this subchapter: Provided, that where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be responsible for the

discrimination suffered by him: And provided further, That in determining whether a complaint shall issue alleging a violation of subsection (a) (1) or (a) (2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the United States courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United

States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect

to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of Title 28.

Also involved is 5 U. S. C. Sections 1007 (b) and 1009 (e)

1007 (b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief or denial thereof.

1009 (e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret, constitutional and statutory provisions, and determine the meaning or applicability of the

terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

Statement

On January 5, 1952 the National Labor Relation's Board certified the United Steelworkers of America, C.I.O. as bargaining representative for approximately 50 of petitioner's production workers at a small machine tool shop in the town of East Greenwich, Rhode Island. Seeking a court review of this certification, the petitioner declined to bargain with the certified union. After hearing, on July 31, 1952, The National Labor Relations ordered the petitioner to bargain with The Steelworkers (100 N.L.R.B. 423). This order was enforced by the Court of Appeals for the First Circuit by decree entered April 22, 1953. (*N.L.R.B.* v. *Efco Mfg. Inc.*, 203 F.2d 458)

On April 14, 1952, while proceedings to enforce the bargaining rights were pending before the National Labor

Relations Board and before its order to bargain had issued and of course before the Court of Appeals had ruled on the issue of representation some of the employee's in the bargain unit went on strike.

In August 1952 the union called off the strike. After that date all but three of the returning strikers who applied for reinstatement were eventually put back to work (the Board held that reinstatement of some of them was wrongfully delayed). Donald Fulford and Charles Arnold were denied reinstatement on account of gross misbehavior during the strike and James Cummisky was not offered reinstatement, the petitioner believing that Cummisky was going into the Army and did not wish to come back to work.

On April 15, 1954, after a hearing on the question of reinstatement rights, the National Labor Relations Board upheld the petitioner's refusal to reinstate Donald Fulford, while ordering reinstatement of Cummisky and Arnold. (108 N.L.R.B. 245.) After a Supplemental Hearing the board ordered that petitioner pay $1995.59 to Arnold and $1473.58 to Cummiskey as wages lost for the periods during which they had been denied reinstatement. (111 N.L.R.B. No. 182.)

Seeking a review of this order the petitioner declined to comply with it and The National Labor Relations Board petitioned the Court of Appeals for the First Circuit for a decree enforcing the back pay order.

Before the Court of Appeals petitioner urged that enforcement of the order denied as to Arnold because of (1) his gross mis-behavior during the strike and notwithstanding a decision on that point that (2) there was no substantial evidence to support the Board's findings as to the amount of Arnold's interim earnings; that (3) as to Cummiskey the preponderance of evidence warranted a finding that he had voluntarily removed himself from the

labor market and had thus disqualified himself for consideration for back pay relief.

The arbitrary nature of the Board's findings in support of its decision and order with regard to back-pay for Arnold was alleged in the Court of Appeals. It was urged that the findings were based solely on Arnold's testimony which was unreliable. He had claimed that his only record of income and expenditures during the interim was kept on the back of a calendar (R.A. 159a-160a) which he destroyed (R.A. 159a-160a) at a time when he knew the question of his right to back pay in whatever amount was pending. (R.A. 165a-166a).

Petitioner contended that had the National Labor Relations Board given proper weight to other testimony by disinterested witnesses it would have decided that Arnold earned more at his interim employment than he would have had he been duly reinstated to his employment with the petitioner. (While Arnold stated that he earned an average of $40 per week (R.A. 162a) two Rhode Island Conservation officers each said that Arnold undoubtedly earned at least $25 a day (R.A. 189a-226a).)

The petitioner contended that the findings of the Trial Examiner which were adopted by the Board were superficial and unrealistic and not in keeping with the preponderance of the evidence as reflected in the following excerpt from his report. (R.A. 261a) Furthermore it is wholly unfair as a restatement of the Company's presentation.

> Respondent contends that because Arnold fished in polluted waters his earnings were many times $40 a week and because of this conduct his testimony is unworthy of belief. The undersigned rejects these contentions. There is no evidence that Arnold's estimate of his earnings rid not include his earnings, if any, from shellfishing in polluted waters. The pre-

sumption from this record is that the $40-a-week figure includes such earnings. A presumption that because Arnold fished in polluted areas he did not tell the truth under oath is not warranted.

Nowhere in the Supplemental Report is reference made to the overwhelmingly contradictory evidence of the Conservation officers except obliquely in the following statement. Summarizing his conclusions the Trial Examiner said (R.A. 261a-262a)

> "Because the facts are peculiarly within Arnold's possession it is difficult for Respondent to attack the facts as to the amount of money Arnold realized from his business venture. Respondent, nevertheless, endeavored to establish that $40 per week is a conservative estimate and that in fact Arnold realized more than that sum. From the evidence adduced it can be surmised and guessed that such may be the situation but such evidence does not warrant findings to this effect. Furthermore, Respondent offered no evidence in contradiction of Arnold and no competent evidence on which it can be estimated how much money Arnold realized if he did, in fact, average more than $40 per week.
>
> On the basis of his observations of witnesses and the record herein the undersigned credits Arnold's testimony and finds that his net earnings accruing from his self employment approximated $40 per week".

To the Trial Examiner whose findings of fact and conclusions were adopted without modification by the National Labor Relations Board and in the Court of Appeals, the petitioner contended that where Arnold's testimony was contradicted by two independent witnesses and was other-

wise uncorroborated, it should have been rejected. He had been convicted of shellfishing in polluted waters. On other occasions he had been observed shellfishing in waters contaminated daily by thousands of gallons of raw sewage; (R.A. 192a-197a); that the conflict of evidence should have been resolved in favor of the Conservation officers whose testimony was more worthy of belief than that of Arnold whose illegal conduct and irresponsible disregard for the health and welfare of others had been observed by each of them.

At the Supplemental Hearing and in the Court of Appeals, the petitioner contended that Cummiskey should not have been awarded back-pay in any amount because he had voluntarily removed himself from the labor market.

It was shown that from September 3, 1952 to March 16, 1953, the critical period for which the Board has ordered the Petitioner to pay Cummiskey $1,473.58 he earned not so much as $1 (R.A. 129a-131a). His efforts to seek employment were confined to making three or more calls at the employment offices of two companies. At each of them on the first call he was informed that no jobs were available. Subsequent calls yielded the same information (R.A. 131a-136a).

It was proved that the best sources of information on employment opportunities were the "Providence Journal" and "Evening Bulletin:" two newspapers published in Providence, Rhode Island and circulated daily throughout the State, that advertising in these two publications was a common and popular manner for employers to seek help; that during the period in question advertisements for many jobs of the sort that Cummiskey was qualified to perform appeared in the "Providence Journal." (R.A. 275a-296a.) During the entire period, he did not once examine the help-wanted columns in either of these newspapers. He knew that both newspapers were on sale daily at a store in his

neighborhood but did not go there because as he said; "Maybe I didn't want to take the walk for two miles." (R.A. p. 138a.)

On these facts the petitioner contended at the Supplemental Hearing and to the Court of Appeals that Cummiskey had failed to exercise reasonable diligence in an effort to obtain alternative employment for the critical period. On that account and in accordance with principles well established by the Board in its administration of the National Labor Relations Act, Cummiskey had disqualified himself from consideration for back pay relief. Following is an excerpt from the Trial Examiners findings and conclusions that Cummiskey had no duty to examine the best source of employment opportunities in the State of his residence. (R.A. 265a-266a.)

> "During the period of time involved herein the Providence, Rhode Island, newspapers carried help wanted advertisements. Nevertheless, Cummiskey did not avail himself of the opportunities afforded by these advertisements. He testified that he did not normally receive these newspapers, that he would have had to walk 2 miles to get them and that the reason he did not get them was "maybe I didn't want to take the walk for 2 miles". He further testified he did examine the classified advertisements in the local newspaper—a weekly published under the name of Wickford Standard —but did not find any "help ads" that he "followed up." There is no evidence that the advertisements in this newspaper sought persons having the background and experience which Cummiskey possessed.
>
> Respondent contends that instead of repeated visits to Chandler-Evans and to Allenton Mills, Cummiskey should have sought more fertile territory, that Cummiskey should have capitalized upon the opportunities

> afforded by the classified advertisements in the Providence newspapers, and that Cummiskey's failure to do these things amounts to a lack of diligence to find employment. While a more prudent person might have done these things, the undersigned cannot, in the light of this record as outlined in this Report, conclude that Cummiskey failed to use diligence. Bearing in mind Cummiskey's age and draft status, Cummiskey's experiences at Chandler-Evans because of his draft status; Cummiskey's registration with the state unemployment office and Cummiskey's individual efforts to get work, including his search through local newspapers, the undersigned believes that Cummiskey made reasonable efforts to secure desirable employment."

It should be noted that there was no proof nor finding that the local weekly newspaper which Cummiskey said he looked at was an acceptable source of employment opportunities.

Reasons for Granting the Writ

A back-pay award authorized by 29 U. S. C. Section 160(c) is not a penalty nor is it a private award for damages. It is a public reparation order to remedy an unfair labor practice from the beginning. *Agwilines, Inc.* v. *N.L.R.B.*, 87 F.2d 146. As such it may not do more than make whole an employee for loss of wages which he would have earned had he not been wrongfully denied employment.

The authority in the National Labor Relations Board to make back pay awards is limited by Title 29, Section 160 (c) to the requirement that the amount awarded in reparation be determined by a "preponderance of the evidence taken by the Board" (p. 2 *supra* where Section 160 (c) is quoted in full text.) That this limitation must

be read into the back pay authority of the Board is supported by the provisions of the *Federal Administrative Procedure Act* (29 U.S.C. Section 1009 (e)) where it is provided that the court reviewing the action of a federal agency shall "... hold unlawful and set aside agency action, findings and conclusions found to be ... (5) unsupported by substantial evidence in any case subject to the requirements of Sections 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute."

There can be no question that the quoted portion of Section 1009 (e) applies to a review of back pay proceedings, (See *N.L.R.B.* v. *National Plastics Products Co.*, 175 F.2d 755) and that an award of back pay must, among other things required by the *Administrative Procedure Act*, be supported by "substantial" evidence.

In the case of Charles Arnold the evidence supporting the award of $1995.59 as in reparation for lost wages is not preponderant nor is it substantial. The petitioner contends that the National Labor Relations Board in awarding back pay to Arnold and the Court of Appeals in its decree confirming the Board's order either misapprehended the standard for evaluating the conflict of evidence bearing on the question of whether or not Arnold suffered a loss of wages in the critical period or arbitrarily failed to apply the proper standard. In *N.L.R.B.* v. *Pittsburgh Steamship Co.*, 340 U.S. 498 this court has indicated that it will intervene in such a case as is here presented.

The evidence to support the Board's order in Arnold's case is limited exclusively to his own testimony which is in direct conflict with other evidence. If the affirmative evidence must "preponderate" there is presented a plain case of an arbitrary ruling. If it must be "substantial" the several definitions of that term require a similar conclusion. From the whole record it will appear that there

is not a single item of independent evidence to corroborate Arnold's story that his earnings averaged $8 to $10 a day, or to override the contradictory evidence of the Conservation Officers that he earned at least $25 a day as a shellfisherman. He had no records. He called no dealer to whom he sold his shellfish. He called no fellow worker. In *Cooding* v. *Willard*, 209 F.2d 913 the definition of substantial evidence indicates that this state of the record will not support the Board's acceptance of Arnold's story and entry of an order thereon. There it was said that "the 'substantial evidence' supporting administrative findings of fact, such as will require courts to accept and give effect to such findings, means more than evidence, which considered alone, would be sufficiently persuasive to induce the trier of fact to give it the credence and weight essential to support findings, and must have those characteristics to such extent that, in the setting made by entire record, trier may reasonably find in accordance with it after giving due consideration to whatever else is shown both in opposition or in accord." When the record before a reviewing court clearly precludes the Board's decision from being justified by a fair estimate of the worth of testimony of witnesses, the decision must be set aside. *U. S. Steel Co.* v. *N.L.R.B.*, 196 F.2d 459.

Unlike the evidence in regard to Arnold, the question of Cummiskey's right to back pay is based on a state of facts as to which there is no dispute. The record discloses that the National Labor Relations Board found that an able bodied young man who was subsequently accepted as a paratrooper in the armed forces of the United States (R. A. 129a) was able to earn not $1 in a period of more than five months; that each day during that period the Providence Journal carried advertisements offering from 70-90 miscellaneous kinds of employment (R.A. 287a) in Rhode Island plants (R.A. 292a-295a). Not once during

that period did Cummiskey think it advisable to go into the Town of Wickford, 2 miles from his home to get the Providence Journal and look at these advertisements of employment opportunities (R.A. 142a).

The petitioner contends that these facts require a conclusive presumption that Cummiskey voluntarily removed himself from the labor market. The Board has consistently denied back pay to an individual who makes no effort to seek other employment. See *Ideal Laundry & Dry Cleaners*, 55 N.L.R.B. 845; *Columbia Pictures Corp.*, 82 N.L.R.B. 845.

Cummiskey registered with the U. S. Employment Service and there is some authority to the effect that this is sufficient compliance with the requirement that the individual seek other employment. *Union Buffalo Mills*, 58 N.L.R.B. 384. Recently when the question was raised in the Court of Appeals for the Fourth Circuit, this concept was rejected. In *Pugh & Barr Inc.*, 207 F.2d 409 the court remanded the matter for further proceedings by the Board saying that registration with the employment service was not sufficient, some "further showing of diligence" being held to be necessary.

The petitioner contends that there is no substantial evidence of a reasonably diligent effort by Cummiskey to seek alternative employment. Repeated visits to a fruitless source will not satisfy the requirement. See *Leister-Kaufman Aircraft Corporation*, 63 N.L.R.B. 1367 No. 209. In this instance the wilful avoidance of the newspaper a primary source of employment opportunities should be grounds for concluding that Cummiskey did not want a job. He was content to work in the family garden (R.A. 142a) and await his call to the Armed Forces.

On this, the only reasonable interpretation of the facts back pay should have been denied as it was in *Subin*, d.b.a. *Arcadia Hosiery*, 112 F.2d 326 for the individual there who was content to devote his time to family duties.

By the 1947 amendments of the National Labor Relations Act the duties and prerogatives of courts reviewing Board actions were enlarged. It appears that Congress intended to restore to the reviewing courts the previously "abdicated" to examine into the evidentiary basis for Board decisions. This appears plainly in the House Conference Committee Report on the 1947 Act where it is said:

> "The Senate amendment provided that the Board's findings with respect to questions of fact should be conclusive if supported by substantial evidence on the record considered as a whole. The provisions of section 10 (b) of the conference agreement insure the Board's receiving only legal evidence, and section 10 (c) insures its deciding in accordance with the preponderance of the evidence. These two statutory requirements in and of themselves give rise to questions of law which the courts will hereafter be called upon to determine — whether the requirements have been met. This, in conjunction with the language of the Senate amendment with respect to the Board's findings of fact—language which the conference agreements adopts—will very materially broaden the scope of the court's reviewing power. This is not to say that the courts will be required to decide any case de novo, themselves weighing the evidence, but they will be under a duty to see that the Board observes the provisions of the earlier sections that it does not infer facts that are not supported by evidence or that are not consistent with evidence in the record, and that it does not concentrate on one element of proof to the exclusion of others without adequate explanation of its reasons for disregarding or discrediting the evidence that is in conflict with its findings. The language also precludes the substitution of expertness for evidence

in making decisions. It is believed that the provisions of the conference agreement relating to the court's reviewing power will be adequate to preclude such decisions as those in *N.L.R.B.* v. *Nevada Consol. Copper Corp.* (316 U.S. 105; 5 Labor Cases 51,1401) and in the Wilson, Columbia Products, Union Pacific Stages, Hearst, Republic, Aviation and Le Tourneau, etc., cases, *supra,* without unduly burdening the courts. The conference agreement therefore carries the language of the Senate amendment into section 10 (e) of the amended act." Conference Report House Report 510, 80th Congress., pp. 55-56.

The question of whether or not back pay should be ordered in a particular case and in what amount is a matter of general national concern. The standards established by the 1947 Amendments of the National Labor Relations Act and the Federal Administrative Procedure Act for evaluating the evidence to support Board orders in that regard have been misapprehended or misapplied by the Court of Appeals for the First Circuit. Also in a matter of wide public interest, there appears to be no decision of any Court of Appeals or by this court from which the parties to such proceedings may obtain reliable guidance.

Conclusion

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix

United States Court of Appeals
For the First Circuit

No. 5018.

NATIONAL LABOR RELATIONS BOARD.

PETITIONER,

v.

EFCO MANUFACTURING, INC.,

RESPONDENT.

ON PETITION FOR ENFORCEMENT OF AN ORDER AND SUPPLEMENTAL ORDER OF THE NATIONAL LABOR RELATIONS BOARD.

[108 N.L.R.B. 245; 111 N.L.R.B. No. 182]

Before MAGRUDER, *Chief Judge*, and WOODBURY and HARTIGAN, *Circuit Judges*.

Sidney A. Coven, Field Attorney, with whom *Theophil C. Kammholz*, General Counsel, *David P. Findling*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Arnold Ordman* and *Nancy M. Sherman*, Attorneys, were on brief, for petitioner.
Milton G. Johnson for respondent.

OPINION OF THE COURT.

December 13, 1955.

HARTIGAN, *Circuit Judge*. This is a petition by the National Labor Relations Board pursuant to Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., § 141 et seq.), for enforcement of its order and supplemental order against respondent, Efco Manufacturing, Inc., East Greenwich, Rhode Island.

A previous order of the Board issued July 31, 1952,

directing respondent to cease and desist from its refusal to bargain with the certified union, United Steelworkers of America, CIO, was enforced by this court on April 22, 1953. *National Labor Relations Board* v. *Efco Mfg., Inc.*, 203 F.2d 458 (1 Cir. 1953).

Respondent does not argue the propriety of the order issued on April 15, 1954, based in part upon findings that " * * * the strikers, being unfair labor practice strikers, were entitled to immediate reinstatement upon application * * * " except as such order relates to Charles W. Arnold directing his reinstatement with back pay.

Neither does the respondent argue the propriety of the supplemental order issued on March 21, 1955, except as such order relates to Charles W. Arnold and James Cummiskey, directing that they be paid $1995.59 and $1473.58 in back pay respectively.

With respect to Arnold the respondent contends that " * * * his illegal conduct during the strike should disqualify him from consideration for back pay but in any event the evidence fails to support the conclusion that during the critical period he earned less than if he had been working for respondent * * * ."

As to Cummiskey, respondent contends that he " * * * is entitled to no back pay because he voluntarily removed himself from the labor market and under established principles of law thus disqualified himself from consideration."

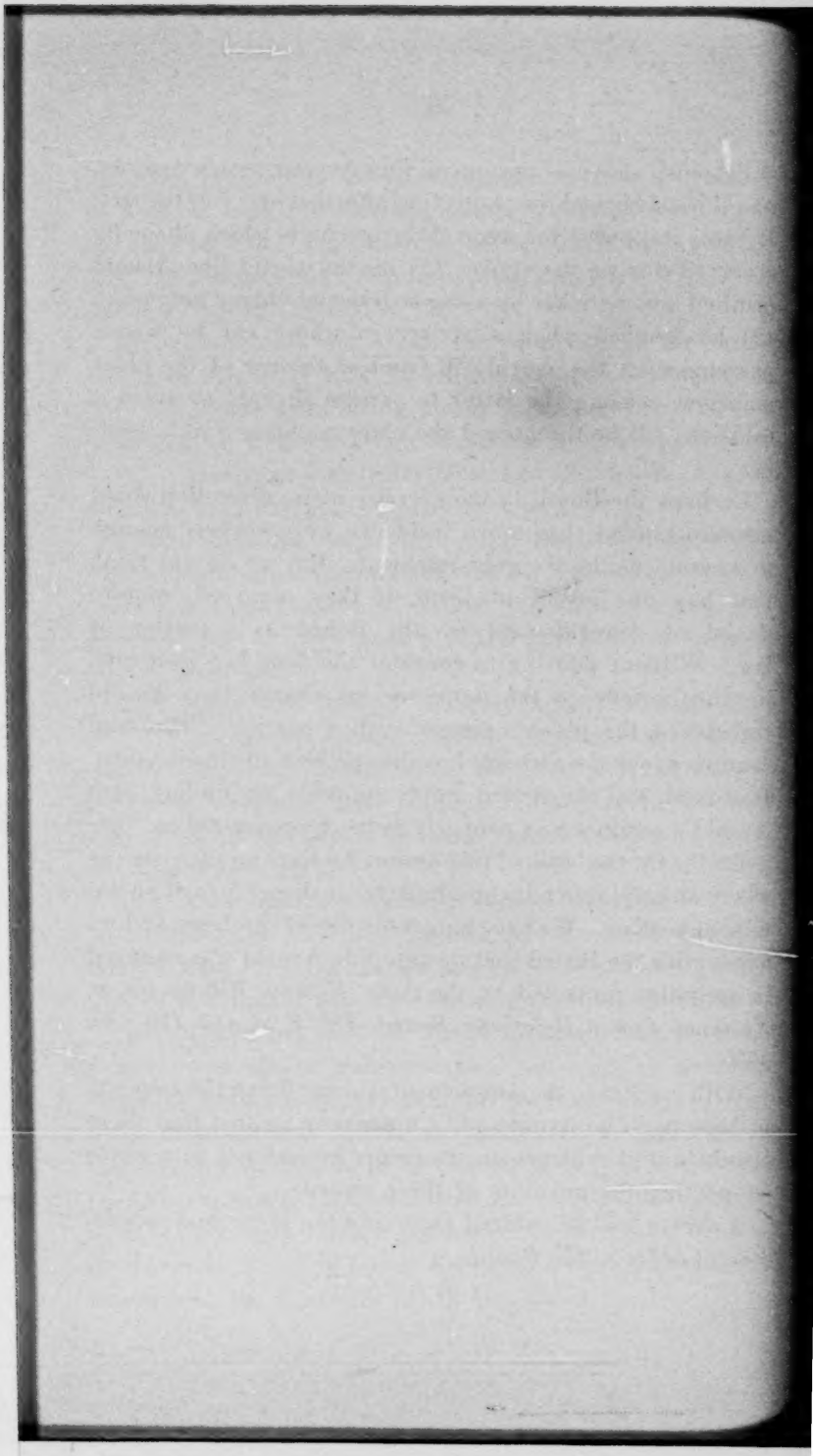
It is established that the strike in which Arnold, Cummiskey, and others were engaged was a strike resulting from the unfair labor practices of the respondent. Under these circumstances where the activities of the striking employees are such as to be protected by § 7 of the Act, the general rule is that employees are entitled to reinstatement with back pay even if permanent replacements must be discharged. *National Labor Relations Board* v. *Remington Rand, Inc.*, 130 F.2d 919, 927 (2 Cir. 1942).

Respondent seems to contend that Arnold, by his conduct, put himself beyond the protection afforded by § 7 of the Act. It bases its contention upon three incidents which allegedly occurred during the strike: (1) on the picket line Arnold insulted a non-striker by using coarse and vulgar language; (2) he laughed when a striker in whose car he was a passenger cut too sharply in front of the car of the plant manager, causing the latter to swerve sharply to avoid a collision; (3) he threatened the plant manager with a beating.

Perhaps the Board in the exercise of its discretion could have concluded that these incidents were serious enough to warrant denial for reinstatement. But we do not think that any one or all of them, if they occurred, require denial of reinstatement by the Board as a matter of law. Without pausing to consider the first two incidents, we turn briefly to the more serious charge that Arnold threatened the plant manager with a beating. The trial examiner took a somewhat less drastic view of this incident. He found, and the record amply supports his finding, that Arnold's conduct was properly to be characterized as "impolite". On the basis of this finding we have no such case as where an employee puts his employer in direct fear of an imminent beating. We have only a display of insolence and we agree with the Board that despite this Arnold was engaged in activities protected by the Act. *Kansas Milling Co.* v. *National Labor Relations Board*, 185 F.2d 413 (10 Cir. 1950).

With respect to the supplemental order fixing the amounts of back pay due Arnold and Cummiskey we find that there is substantial evidence on the record considered as a whole supporting the amounts of these awards.

A decree will be entered enforcing the order and supplemental order of the Board.



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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 717

EFCO MANUFACTURING, INC., PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. pp. 19-21) is reported at 227 F. 2d 675. The Board's original decision and order (R.A. 69a-123a) [1] is reported at 108 NLRB 245; its supplemental decision and order (R.A. 259a-271a) is reported at 111 NLRB 1032.

[1] The symbol "R.A." refers to the appendix to the Board's brief filed in the court below. Wherever a semicolon appears, the references preceding the semicolon are to the Board's findings; those following the semicolon are to the supporting evidence.

JURISDICTION

The judgment of the court below was entered on December 13, 1955. The petition for a writ of certiorari was filed on February 28, 1956. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The pertinent statutory provisions appear on pages 2 to 6 of the petition for certiorari.

QUESTION PRESENTED

Whether the Board's order fixing the amount of back pay due to two employees against whom petitioner discriminated in violation of the National Labor Relations Act is supported by substantial evidence on the record as a whole.

STATEMENT

A. The Facts as Found by the Board

1. *The unfair labor practice proceeding culminating in the Board order of April 15, 1954*

On April 14, 1952, petitioner's employees went on strike in protest against petitioner's refusal to bargain with the employees' certified bargaining representative (R.A. 73a, 114a; 4a-5a). Among the strikers were Charles Arnold and James Cummiskey, both of whom, together with a number of others, individually applied to petitioner for reinstatement after the strike terminated on August 12, 1952 (R.A. 75a, 79a, 80a, 82a, 85a, 87a, 90a, 92a, 93a, 99a, 117a; 11a-14a). Petitioner denied rein-

statement to some of these employees, including Arnold; failed to respond to the applications of others, including Cummiskey; and delayed offering or failed to offer reinstatement to others (R.A. 77a-103a, 88a, 118a; 14a, 15a, 68a).

The Board found, in relevant part, that petitioner violated Section 8(a)(3) and (1) of the Act by refusing to reinstate Employee Arnold and by failing to offer reinstatement to Employee Cummiskey (R.A. 79a, 81a, 82a, 85a, 86a, 87a-88a, 89a, 92a, 93a, 95a, 96a, 119a). Accordingly, the Board (R.A. 119a-123a) directed petitioner to offer reinstatement to Arnold and Cummiskey and to make them whole for any loss of pay they may have suffered by reason of the discrimination against them by payment to each of them of a sum of money equal to that which he would have normally earned as wages from the date of his application for reinstatement to the date of petitioner's offer of reinstatement, less his net earnings, if any, during said period.

2. *The back-pay proceedings and the supplemental order*

After the issuance of the Board's order, petitioner indicated that it proposed to comply therewith but that it questioned the amount of back pay claimed on behalf of Arnold and Cummiskey and other employees covered by the Board's order. Accordingly, the Board scheduled a back-pay hearing at which evidence was adduced before a trial examiner. The Board subsequently affirmed the trial

examiner's findings as to the amount of back pay due the employees in question, and issued a supplemental order requiring petitioner to pay certain specified sums to Arnold and Cummiskey and other employees (R.A. 270a-271a). So far as is here material, the evidence adduced at the back-pay hearing with respect to Arnold and Cummiskey whose awards of back pay are challenged by petitioner is summarized below:

a. *Charles Arnold* applied for reinstatement in August 1952 but petitioner refused to reinstate him (R.A. 75a, 78a, 259a; 13a, 15a-16a, 68a). Thereafter he worked for another employer until February 1953, when he was laid off (R.A. 260a; 158a). He then became self-employed as a shellfisherman (*ibid.*). He continued this private business venture until May 10, 1954, when petitioner offered him reinstatement and he accepted (R.A. 260a; 158a, 159a). The only issue before the Board was his earnings as a shellfisherman between February 1953 and May 1954, which under the Board's order were to be deducted from the amount of back pay otherwise due him (R.A. 104a, 260a-261a; 126a-127a).

Relying in part upon Arnold's demeanor as a witness, the trial examiner and the Board credited Arnold's testimony under oath that his earnings averaged about $40 a week during this period (R.A. 260a, 261a-262a; 161a-162a). Arnold based this testimony on his income tax return, also executed under oath, which he had filled out on the basis of a daily income record he had kept on the back of a

calendar (R.A. 260a; 161a-162a, 164a, 247a-255a). While this daily income record was not available at the supplemental hearing, having been lost or accidentally destroyed by Arnold before the amount of back pay became an issue, the record contains other evidence corroborating Arnold's testimony that his earnings as a shellfisherman amounted to about $2080 a year (R.A. 260a; 185a-188a). Arnold's shellfishing job required him to work only 4 days a week and 7 hours a day, and permitted him to take time off whenever he chose (R.A. 166a-167a, 171a, 173a-177a). Nevertheless, Arnold, who had a wife and child to support, accepted petitioner's tender of a job requiring him to work 8 or 9 hours a day and 5 or 6 days a week, and paying $3300 a year, even though Arnold had engaged in shellfishing as a pastime or sideline since boyhood, and even though petitioner offered him reinstatement at a time of year when shellfishing was most pleasant and most profitable (R.A. 125a, 158a, 166a, 167a, 173a-176a, 182a, 228a-232a).

Although alleging that Arnold's real earnings were more than twice the amount he testified to, petitioner made no effort to show that Arnold's expenditures, savings, or standard of living was greater than his admitted income would permit. Instead, petitioner relied solely upon the opinion testimony of two officers of the State Conservation Department that if Arnold's average daily catch equalled his catch on the occasions, about once a month, that they had observed him and that if other shellfishermen had accurately reported pre-

vailing prices for shellfish and their yearly income, Arnold should have made at least $5,000 a year—half again as much as his yearly income from the job which he accepted at petitioner's plant (R.A. 191a, 202a-205a, 210a-214a, 217a-223a, 224a-226a). The Board gave little weight to this testimony, on the ground that it constituted "surmise" and "guess" (R.A. 261a). Accordingly, in determining the back pay due Arnold for the time during which he worked as a shellfisherman, the Board deducted the earnings to which he testified from the amount that petitioner stipulated he would have received absent its discrimination against him (R.A. 268a-269a, 271a).

b. *James Cummiskey* applied for reinstatement in September 1952 but was not offered reinstatement until March 1953, after the hearing in the unfair labor practice case (R.A. 264a; 2a, 13a-14a, 129a, 139a). Petitioner contended before the Board that Cummiskey was not entitled to any back pay because he allegedly failed to make a reasonable search for employment during the period for which he was awarded back pay.

Cummiskey was a 19-year old boy with limited work experience who, at the time that petitioner wrongfully failed to offer him reinstatement, expected to be drafted into military service in the near future (R.A. 264a; 131a, 133a). After petitioner failed to respond to his application for reinstatement, for reasons not revealed by the record, Cummiskey applied for unemployment compensation (R.A. 264a; 139a). While he was receiv-

ing unemployment compensation he consulted the Rhode Island State Employment Service every week, and after his insurance payments were exhausted, he consulted it twice a month (*ibid.*).[2] However, the State Unemployment Service never referred him to any jobs (R.A. 264a; 139a-140a). Cummiskey unsuccessfully sought employment with a nearby cemetery where he had previously worked; with the Ideal Windlass Company, where his father was "boss"; and, on several occasions, with the Allentown Mills and with the Chandler-Evans Division of the Niles-Bement-Pond Company (R.A. 265a; 130a, 138a); Chandler-Evans refused to hire him because he was of draft age (R.A. 265a; 131a-135a). Cummiskey also consulted the help-wanted advertisements in his home town newspaper, apparently the only one subscribed to by his family (R.A. 265a; 136a-137a). Cummiskey never learned of any jobs available which he was qualified to fill (R.A. 265a; 138a).[3] Although petitioner's secretary-treasurer was aware of certain vacancies, he never told Cummiskey about them (R.A. 227a). Cummiskey accepted petitioner's offer of reinstatement, tendered about 7 months after he applied for it, and worked until called into service (R.A. 264a; 129a, 239a).

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[2] The State employment office was open only one day a week (R.A. 139a).

[3] Unemployment was then widespread in the area. See United States Department of Labor, Bureau of Employment Security, Bi-monthly Summary of Labor Market Developments in Major Areas, pp. 24, 25, 45-46 (November 1953).

The Board concluded (R.A. 266a) that "Bearing in mind Cummiskey's age and draft status, Cummiskey's experiences at Chandler-Evans because of his draft status; Cummiskey's registration with the State Unemployment Office and Cummiskey's individual efforts to get work, including his search through local newspapers, * * * Cummiskey made reasonable efforts to secure desirable employment" (R.A. 266a). The Board held that Cummiskey was therefore entitled to receive back pay for the period prescribed in the Board's order (R.A. 264a, 266a).

B. The Opinion of the Court Below

The court below enforced in full the Board's unfair labor practice order and supplemental order fixing the amounts of back pay due to the employees. So far as here material, the Court stated (Pet. p. 21), "With respect to the supplemental order fixing the amounts of back pay due Arnold and Cummiskey we find that there is substantial evidence on the record considered as a whole supporting the amounts of these awards."

ARGUMENT

The basic issue presented in the instant case is the sufficiency of the evidence to support the back-pay award to the two employees made by the Board and approved by the court below. Petitioner's challenge to the substantiality of the supporting evidence presents no question of general importance warranting review by this Court. *National*

Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U. S. 498, 502-503. Moreover, as the Statement shows and the court below found, the Board's findings are adequately supported by the record as a whole.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH 1956.

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